No. 91-1532

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

JEANNE A. FARNAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Should the court use this case as a vehicle to define materiality for purposes of tax violations?

2. Should the court use this case as a vehicle to resolve the existing conflict among the circuits as to what is a "material matter" for criminal tax law purposes?

3. How does *Cheek v. United States,* ____ U.S. ____ (1991) affect the materiality requirement of 26 U.S.C. § 7206(1)?

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No.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Jeanne A. Farnan ("Farnan") respectfully petitions for a writ of certiorari to review the court of appeals' opinion affirming her conviction.

OPINIONS BELOW

The district court did not write an opinion. It rendered a jury verdict. The court of appeals affirmed in an unpublished opinion, referenced at 945 F.2d 1283.

STATEMENT OF JURISDICTION

The court of appeals affirmed Farnan's conviction on November 18, 1991. A timely petition for rehearing with suggestion for rehearing in banc was denied on February 20, 1992. The court granted Farnan's motion to stay the mandate pending this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7206(1) of the Internal Revenue Code (hereinafter sometimes referred to as "Code"), 26 U.8.C. § 7206(1), states:

> Any person who —
>
> (1) *Declaration under penalties of perjury.* Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 . . . or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

The United States District Court for the Eastern District of Virginia derived jurisdiction to hear Farnan's case under 18 U.S.C. § 3231.

This case is a criminal prosecution of a business woman upon

an indictment originally alleging seven felony tax violations relating to the years 1982, 1983 and 1984. The case was tried over the course of five days. All of the counts for tax evasion, as well as three other counts for false returns and two specifications of falsity were taken from the jury when the district court granted the defendant's motion for judgment of acquittal.

The sole accusation submitted to the jury was a charge of willfully subscribing a false return which she did not believe to be true and correct as to every material matter. The false statement contained on petitioner's return concerned home mortgage interest which was paid for her by a lender without her handling the funds in 1985, but was deducted on her 1984 return by the accountant who prepared it.

A jury convicted petitioner. The district court sentenced petitioner on August 31, 1990 to serve a term of three months, a one year period of supervised release, pay a fine of $500, and pay a special assessment fine of $50. The district court stayed imposition of incarceration pending Farnan's appeal to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed in a 2-1 opinion and stayed its mandate.

STATEMENT OF FACTS

Jeanne A. Farnan ("Farnan" or "petitioner") was indicted in 1990 for alleged tax felonies relating to tax years 1982, 1983 and 1984. In 1987, Farnan filed four tax returns for those years, consisting of an original and an amended return for 1982 and single returns for 1983 and 1984. Farnan's accountant, David Bill, ("Bill") prepared and signed each return. Bill insisted that an amended return for 1982 be filed because he felt he had made a mistake on the original 1982 return. Farnan's indictment charged seven counts, tax evasion for each of the years and false returns for each of the returns. (In 1982, Farnan filed an amended return.)

Farnan was a loan broker for companies (hereinafter "the companies") in which she allegedly owned the controlling interest. She and her companies had done fairly well by 1984, and she acquired a home with a large mortgage on it held by Piedmont Savings in Fauquier County, Virginia.

In 1982, Farnan became embroiled in massive litigation with a customer, Barclay Properties, Inc., over a $3,000,000 loan commitment. The litigation continued from 1982 through 1985. This litigation ultimately resulted in a judgment for several million dollars against Farnan and the companies. Legal fees and the judgment forced Farnan to file a voluntary bankruptcy petition.

In mid-1983 the Bankruptcy Court in Alexandria, Virginia issued an order to the trustee directing him to enter the offices of the companies in McLean, Virginia, to change the locks thereon if necessary, to gain entry, and to take actual possession of checkbooks, bank statements, and every "scrap of paper" then located on the premises of the debtor (Farnan), and to remove same to a place of his choosing with reasonable access to be granted to the debtor to review the records when necessary.

The trustee in executing the court's order seized Farnan's personal financial records along with company records. Throughout all the indictment years and into 1986, Farnan's original records were constantly subpoenaed for collection discovery proceedings. They were not returned to her. Farnan's attorneys requested the return of her documents on a number of occasions, but were ignored. IRS and the creditors even ignored a 1985 Bankruptcy Court order requiring the records be returned to Farnan.

During these years, she and the companies suffered large financial losses. Farnan did not file any personal tax returns from 1982 until 1987. However, Farnan sporadically did work with her

accountants on her returns from 1982 until they were filed in 1987.

During the *Barclay* litigation, Mrs. Farnan borrowed $105,000 at high interest rates from Ralph Kaiser (Kaiser), a District of Columbia money-lender, to invest in the failing companies. To secure this loan, she placed a second mortgage on her Fauquier County home, which was already encumbered by the Piedmont mortgage.

Starting in 1983, and continuing through 1984, Farnan had trouble staying current on her home mortgage payments. In 1984, she paid over $36,000 in interest and became current with Kaiser at the end of 1984. However, in February 1985, Kaiser took possession of Farnan's Fauquier property and at that time advanced funds to pay Piedmont's unpaid interest, including $41,000 of interest for 1984, all of which he charged to principal on Mrs. Farnan's promissory note due him. In this way, $41,000 of Farnan's money was used to pay interest accrued in 1984 on her home mortgage without her handling it. This interest was paid in February 1985, not during 1984.

In 1987, Farnan gave her records to her accountant to help him prepare her 1982-1985, inclusive tax returns. Among the records was a Form 1098 issued by Piedmont Savings in 1986 showing that $100,787 in interest, about two and one-half years' worth, had been paid to it in 1985.

At Farnan's trial, the government presented no evidence, either direct or circumstantial, that indicated that Farnan had any purpose to deceive or to mislead the IRS, or to escape taxes by signing and filing the 1984 return prepared by the accountant. In fact, the evidence revealed that Farnan had failed to deduct $60,000 in interest actually paid on the same mortgage over the five-year period 1981-1985, which included the three indictment years. At the close of the evidence, the court withdrew from the

jury six of the seven counts and two of the three specifications of falsity alleged in Count Six, but allowed that count, as reduced, to go to the jury.

Farnan's counsel specifically requested the court to instruct the jury that to constitute a crime, under Code § 7206(1), a defendant must make a statement which he does not believe to be true and correct "as to every *material* matter" (emphasis supplied). Farnan's counsel requested the following jury instruction.

REQUEST NO. 33

MATERIALITY

> The Government must prove that the defendant did not believe at the time she signed and filed her tax returns that the returns were true and correct as to every material matter. *United States v. Taylor,* 574 F.2d 232 (5th Cir. 1978), *cert. denied,* 439 U.S. 893 (1978).
>
> The test of materiality is whether a particular item must be reported in order that the taxpayer estimate and compute her tax correctly. *United States v. Null,* 415 F.2d 1178 (4th Cir. 1969). The Government must prove beyond a reasonable doubt that the matter *was* material and that the defendant then and there *believed* it was material.

The court refused to give said instruction. Instead, the court gave this instruction:

> Now, deductions taken on income tax returns are material matters as required under Section 7206.

Tr. 6/11 and 6/12/90 at 70.

The court thereby ruled as a matter of law that all deductions are material. Further, the judge ruled that Farnan's belief as to whether the interest deduction was material was not an element of the offense. In fact, the 1984 interest deduction made no tax difference, since Farnan owed no tax even without said deduction.

The jury deliberated for quite a while, said it "might" reach a verdict in another hour, when it did not, it then announced it was a "hung jury." The court instructed it to try again. The jury then asked to hear the testimony of the tax return preparer, and the court refused. The jury also asked to hear the instructions again and the court refused. Finally, the jury asked about direct and circumstantial evidence, and the court told them they were to be given equal weight. The jury then deliberated several more hours and returned a guilty verdict. The instant judgment was upheld on appeal by a 2-1 vote.

REASONS FOR GRANTING THE WRIT

Review by this court is essential to establish a uniform definition of what constitutes a "material matter" under Code § 7206(1) and precisely how *Cheek v. United States, infra,* impacts said definition. The district court here held as a matter of law and contrary to the Fourth Circuit's specific definition of materiality in *Null v. United States, infra,* that all deductions on a tax return are material. The court entirely disregarded both the Fourth Circuit's definition of the term and the subjective intent of the taxpayer. By doing so, it ignored and relieved the prosecution from proving essential elements of the crime. This deprived Farnan of due process.

In this Court's October 1990 Term, it heard and decided *Cheek v. United States,* ____ U.S. ____, 111 S. Ct. 604 (1991). Cheek, was an airline pilot who for many years did not file his federal income tax returns in violation of Code § 7203. Cheek admitted that he did not file his returns and sought to prove that he had not acted willfully because he sincerely, albeit erroneously, believed that the federal tax system is unconstitutional.

The Court following its earlier cases of *United States v. Bishop,* 412 U.S. 346 (1973) and *United States v. Pomponio,* 429 U.S. 10 (1976) (per curiam) held that where a taxpayer is accused of violating a known duty that the Code imposes upon him, the government must prove willfulness by proving as a factual element of the crime that the taxpayer subjectively believed that he violated the law. It is not enough for the prosecutor to show objectively the defendant broke the law. *Cheek,* 111 S. Ct. at 610.

The district court tried Farnan's case in the summer months of 1990 before *Cheek, supra,* was decided. In June 1991, the Court of Appeals for the Fourth Circuit heard Farnan's case and summarily affirmed her conviction without applying the *Cheek,*

supra, subjectivity test although expressly asked to do so by Farnan.

I.

THE COURTS OF APPEALS ARE IN CONFLICT AS TO WHAT CONSTITUTES A MATERIAL MATTER UNDER CODE § 7206(1). EVEN THOUGH THE STANDARD IS UNCLEAR AMONG THE CIRCUITS, FARNAN'S TAX DEDUCTION WAS NOT MATERIAL AS THAT TERM IS DEFINED IN THE FOURTH CIRCUIT. FARNAN'S TAX RETURN DOES NOT CONTAIN A WILLFUL FALSE STATEMENT OF A MATERIAL FACT.

Section 7206(1) of the Code states:

> Any person who . . . [w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony . . .

The proper construction of a statute begins with its plain language. *Dickman v. Commissioner,* 465 U.S. 330 (1984). If there is an ambiguity, then a court can look to the statute itself and its context within the revenue laws. *United States v. Bishop,* 412 U.S. 346, 356-57 (1973).

Because a statute must be read to give meaning to every word, it is clear that not every item or mistake on a tax return is "material" within the meaning of section 7206(1), otherwise Congress would not have placed that word in the statute. Determination of what constitutes a "material matter" within

26 U.S.C. § 7206(1) has caused a conflict among the courts of appeals.

There are only two parts to a tax return. They are income and deductions. There is a crucial difference between the two for materiality purposes. The courts have held that

> False statements relating to gross income, irrespective of amount, constitute a material misrepresentation in violation of § 7206(1).

United States v. Citron, 783 F.2d 307, 313 (2nd Cir. 1986); *United States v. Hedman*, 630 F.2d 1184, 1196 (7th Cir. 1980), *cert. denied*, 450 U.S. 965 (1981).

The Court of Appeals for the First Circuit held in *United States v. Romanow*, 509 F.2d 26 (1st Cir. 1975), that a statement is material if it is "a necessary item to compute what is currently due and owing between the taxpayer and the Government." *Id.*

The Court of Appeals for the Fourth Circuit has held:

> Under § 7206(1) the test of materiality is whether a particular item must be reported "in order that the taxpayer estimate and compute his tax correctly."

United States v. Null, 415 F.2d 1178, 1181 (4th Cir. 1969). In *Null*, the defendant omitted items of income from his return for two successive years.

In the instant case, however, the fourth circuit squarely, inexplicably and surprisingly ignores *United States v. Null, supra.* Appendix A at 6a. Because of this, Farnan could not possibly have known what was and what was not material when she signed

her tax return. Such a situation constitutes criminal charge by surprise and directly violates the Constitution's *ex post facto* prohibition — Const. Art. 1 § 9 Clause 3.

Farnan's constitutional and inextricable dilemma applies to every taxpayer. First, taxpayers don't know, because the courts do not agree on, what constitutes a material misstatement of a tax deduction for purposes of Code § 7206(1). Each circuit has either a separate test or no test. Next, even where, as here, the court of appeals has decided on the proper definition of materiality for its circuit and has thereby advised its citizens of same, it is free to disregard its own definition on an *ad hoc* basis, as it did here. Accordingly, the citizens are ambushed and the prosecutor is free to exploit the resulting confusion through prosecutions such as Farnan's when he decides to do so.

It is therefore imperative for this court to articulate a standard of tax return materiality to notify the people of what conduct will be criminal, and to require the courts to uniformly abide thereby. This will permit the people to run their lives with a measure of predictability not possible heretofore.

Farnan's Piedmont interest was an ordinary deduction, which was not required to be reported on her personal tax return as a matter of law. *United States v. Null, supra.* If a taxpayer does not deduct interest paid by him on his return for the year of payment, the taxpayer loses the benefit of that deduction for that year and cannot deduct it in a later year. The absence of any requirement that interest paid on mortgages be reported in personal tax returns shows clearly that no governmental purpose is affected by a reporting error as to interest, unless there is some effect on a tax owed.

If the computation of a tax owed on the return is not affected, as it was not here, the inclusion of an interest deduction item

is merely the inclusion of extraneous information which has no effect on tax liability.

Farnan received no benefit whatsoever from the error on her 1984 return. Farnan owed no tax with or without the interest deduction.

The instant district court's statement on materiality was that "deductions taken on income tax returns are material matters as required under Section 7206, Subsection 1." Farnan's research has not revealed a precedent holding that deductions are always "material" matters. That depends on the facts of the case, especially in the fourth circuit where tax impact is synonymous with materiality. *United States v. Null, supra.*

The court's instruction that all deductions are material, even those that don't affect tax liability directly violates Code § 7206(1), *United States v. Null, supra* and *Cheek, supra.*

II.

FARNAN WAS DEPRIVED OF DUE PROCESS. THE TRIAL COURT ELIMINATED THE REQUIREMENT THAT THE GOVERNMENT PROVE MATERIALITY AS AN ESSENTIAL ELEMENT OF THE CRIME.

The Constitution requires that the government prove beyond a reasonable doubt all elements necessary to constitute a crime. This Court has stated:

> Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of

> every fact necessary to constitute the crime with which he is charged.

In Re Winship, 397 U.S. 358, 364 (1970).

The Constitution also mandates that a criminal defendant has the right to have a jury determine the factual elements of the crime charged. U.S. Const. Art. III, § 2A Clause 3; Amend. VI.

In Farnan's case, the court took from the jury both the issue of materiality (the court ruled all tax deductions are material) and the issue of whether Farnan subjectively believed her deduction was material.

The court was instead required to instruct the fact finder on the definition of materiality so that the jury could assess whether the instant facts met that standard. Additionally, the court should have charged the jury to consider whether Farnan actually believed said item was material. It omitted to do both these essential things.

Petitioner respectfully urges this Court to hear her case, articulate a uniform definition or test of materiality under Code § 7206(1) and require the courts to apply that standard uniformly. This will both clarify and give the people predictability in the law.

III.

REGARDLESS OF WHETHER THE DEDUCTION WAS MATERIAL, THIS COURT'S *CHEEK* HOLDING MANDATES THAT THE GOVERNMENT PROVE THAT THE DEFENDANT SUBJECTIVELY BELIEVED THAT THE DEDUCTION WAS MATERIAL AND THAT SHE KNEW SHE HAD A LEGAL DUTY NOT TO MISSTATE IT.

The lower courts have either refused to apply or departed from this Court's holding in *Cheek v. United States, supra,* in sustaining Farnan's conviction.

The willfulness required for a conviction in a criminal tax case is a "voluntary, intentional violation of a known legal duty." *United States v. Bishop,* 412 U.S. 346, 360 (1973). "Neither bad purpose nor evil motive is an independent element of willful[ness]". Willfulness is a shorthand term to indicate a conscious effort to commit wrongdoing. *United States v. Hawk,* 497 F.2d 365, 368 (9th Cir. 1974), *cert. denied,* 419 U.S. 838 (1974) (cited with approval by *United States v. Pomponio,* 429 U.S. 10, 13 (1976) (per curiam)). "[T]he government may prove willful conduct by establishing either: (1) that the defendant acted with a bad purpose or evil motive, or (2) that the defendant voluntarily, intentionally violated a known legal duty." *United States v. Powell,* No. 90-10060, 1992 WL 18793, at *8 (9th Cir. Feb. 6, 1992). Proof of willfulness requires more than proof that the defendant submitted incorrect information. *United States v. Snider,* 502 F.2d 645, 654-55 (4th Cir. 1974).

In *Cheek, supra,* this Court held that when there is no claim that the provision of the law is invalid, the government proves willfulness for a crime under the tax code when it demonstrates the defendant's actual knowledge of the pertinent legal duty involved. *Cheek,* 111 S. Ct. at 610. "But carrying this burden

requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax laws." *Id.* at 610-11.

Cheek, supra, squarely holds that a taxpayer's subjective belief of her duty under the tax laws, in this case not to misstate a material matter, is a factual matter for the jury to decide. *Id.* at 611. Thus, if Farnan had a subjective good faith belief, no matter how unreasonable, that she did not misstate a material matter on her 1984 return, as a matter of law, she did not act willfully. *Id.*

Farnan's 1984 return showed her taxable income without the Piedmont interest deduction to be a loss of $15,211. With the Piedmont deduction of $41,139, the loss increased to $56,350. In either case, there is no tax effect whatsoever for any year.

Farnan's accountant, David Bill, testified unequivocally that he personally calculated the Piedmont interest figure for 1984 and "decided to include that figure on the 1984 return, with no urging or pressure by Mrs. Farnan." (Appendix B at 7a, 9a and 11a).

He testified that the Piedmont interest must have been paid in 1984, because he could not conceive of a savings and loan going more than a year without interest payments and not foreclosing. In truth, Piedmont did not foreclose, a junior trust holder did.

Bill further testified that after completing the 1984 return, he went over it generally with Farnan, explaining that there was a capital loss carry forward (in which the Piedmont interest deduction played no part) and no tax due. The accountant's explanation of Farnan's return gave her an honest belief that the Piedmont interest item was not a material matter because she did not owe any taxes.

The Court of Appeals for the Fourth Circuit has stated clearly, "Under § 7206(1) *the test of materiality* is whether a particular item must be reported 'in order that the taxpayer estimate and compute his tax correctly.' " *United States v. Null*, 1178, 1181 (4th Cir. 1969) (emphasis added) (quoting *United States v. Rayor*, 204 F. Supp. 486, 491 (S.D. Cal. 1962)). *Null, supra*, is the law within the fourth circuit. A simple application of the *Null, supra*, test to the facts of Farnan's case clearly shows that, regardless of whether she knew or was ignorant of the pertinent legal duty involved, she could not have acted willfully because inclusion of the erroneous Piedmont deduction had no effect on her tax liability. Accordingly, and ironically here, Farnan passes the subjective *Cheek, supra*, test and the more stringent objective willfulness test if *Null, supra*, applies, as it does here.

Farnan is at a loss to explain why a rational taxpayer would knowingly file a return containing a false deduction when no tax consequences result therefrom.

If Farnan honestly believed either (1) her accountant's advice or (2) that the Piedmont interest deduction was not material because she owed no tax even without it, relying upon *Null, supra,* then she is innocent because she lacked both subjective and/or objective willfulness. She should not lose her freedom under these circumstances. This court can use this to set forth a uniform standard and command the courts to comply therewith.

A. Farnan's reliance on an accountant provides a complete defense to the government's case.

Farnan placed preparation of her 1984 return in the hands of an accountant, David Bill, and he prepared it. Farnan informed Bill that her information and records were incomplete. Bill did not rely solely on the information Farnan gave him (Appendix B at 9a). The record discloses he performed independent research

to discover underlying facts. The accountant applied the facts, applicable law, and his ethical constraints as an enrolled IRS representative to assure the return's accuracy. Relying on her accountant's work, Farnan signed without change or argument every return he prepared.

Because Farnan thus relied upon her accountant's work, the government bore the burden of proving beyond a reasonable doubt that she did not so rely. *United States v. Pechenik*, 236 F.2d 845 (3rd Cir. 1956). The government introduced no evidence whatsoever on this point.

Because Farnan's reliance on her accountant constitutes a complete defense to the charge, the court was required to give the jury "an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in [her] favor." *Mathews v. United States*, 485 U.S. 58, 63 (1988). The district court committed reversible error when it refused to give Farnan's requested Instruction No. 32 — *Good Faith Defense* articulating the defense of good faith reliance on her accountant. *See id.* at 62.

Farnan's defense of reliance on an accountant bore directly on the issue of whether she willfully and knowingly misstated a material matter on her return. "The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." *Cheek*, 111 S. Ct. at 609. Farnan therefore sought the advice and assistance of a professional tax return preparer. Said preparer gave advice which both objectively and subjectively negates willfulness.

The district court erred when it gave instructions that presumed materiality, failed to give the requested good faith and reliance instructions and wholly ignored the subjective willfulness

standard, especially considering Farnan's reliance upon her accountant and his corroboration.

This is particularly so here where Farnan did not have complete access to her records, due to her bankruptcy. Her records were incomplete. The jury easily could have been confused that because Farnan did not have certain records to give her accountant, that she was prohibited from relying on the defense of professional advice.

" 'Congress did not intend that a person by reason of . . . the adequacy of the records he maintained, should become a criminal by his mere failure to measure up to the prescribed standard of conduct.' " *United States v. Pechenik*, 236 F.2d 844, 846 (3rd Cir. 1956) (quoting *United States v. Murdock*, 290 U.S. 389, 396 (1933)).

Farnan's "Reliance on Tax Return Preparer" instruction contained her theory of defense. The jury's later actions and questions show that had this instruction been given, it would have directly addressed a point which gave the jury the most difficulty. The district court's failure to give a "theory of defense" instruction requires that the conviction be reversed and that she have a new trial on that charge. *Mathews*, 485 U.S. at 63.

In *United States v. Pechenik*, 236 F.2d 844 (3rd Cir. 1956), the court considered whether the evidence of willful intent was sufficient to support a conviction of willfully attempting to evade or defeat income taxes. The court held that the record failed to reveal evidence linking the defendant with the erroneous books and tax returns in any manner that would support the necessary findings of willfulness, emphasizing that the defendant left the bookkeeping and preparation of tax returns to his bookkeeper and accountant. *Id.* 236 F.2d at 846.

The court relied on the accountant's testimony that he did not attribute the errors to the defendant or to any directions or information given by the defendant, and the evidence that nothing was concealed. The court held that the evidence did not establish knowledge and willfulness on the part of the defendant, and reversed the judgment with direction to enter a judgment of acquittal. *Id.* at 847.

Similarly in Farnan's case, her accountant testified that the error on the 1984 tax return did not originate with Farnan or from any information given by her (Appendix B at 7a, 9a, 11a). There is no evidence that Farnan concealed anything or refused to give her accountant any information she possessed. The evidence does not support a conclusion that Farnan knew that the tax return prepared by her accountant was erroneous in any way.

CONCLUSION

The petition for a writ of certiorari should be granted to permit this court a vehicle to define materiality for purposes of tax violations, to resolve the existing conflict among the circuits, to require the courts to apply the term once defined uniformly and to integrate *Cheek's* mandate into criminal tax law.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED NOVEMBER 18, 1991

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JEANNE A. FARNAN,

Defendant-Appellant.

No. 90-5799

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge.
(CR-90-60-A)

Argued: June 7, 1991

Decided: November 18, 1991

Before RUSSELL, WIDENER, and MURNAGHAN, Circuit Judges.

COUNSEL

ARGUED: Henry St. John Fitzgerald, McLean, Virginia, for Appellant. Kimberly Mary Zimmer, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee, ON BRIEF: Jane Juliano, McLean, Virginia; Robert P. Trout, DUNNELLS, DUVALL & PORTER, Washington,

D.C., for Appellant. Shirley D. Peterson, Assistant Attorney General, Robert E. Lindsay, Alan Hechtkopf, Elise C. Weinstein, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Henry E. Hudson, United States Attorney, David G. Barger, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

OPINION

PER CURIAM:

Jeanne A. Farnan, having failed timely to file her 1982, 1983, and 1984 individual federal income tax returns, was prosecuted for seven felony tax violations. On six of them, judgment of acquittal was entered at the close of the prosecution's presentation. However, a finding of guilt was returned by the jury with respect to a charge of willful false statement shown on her 1984 return which claimed as an interest deduction the amount of $41,139, though she did not make the payment in 1984.

Farnan's principal arguments have concerned the language of 26 U.S.C. § 7206(2). That statute makes it a felony willfully to present a matter arising under the internal revenue laws "which is fraudulent or false as to any *material* matter." (Emphasis added). Farnan's contention has been that the district court erred in making materiality for the purposes of 26 U.S.C. § 7206(b) a matter of law for the court rather than a matter of fact for the jury. She has relied on *United States v. Null,* 415 F.2d 1178 (4th Cir. 1969). However, *Null,* as explained in *United States v. Rogers,* 853 F.2d 249 (4th Cir. 1988), does not stand for the proposition for which Farnan has contended. In *Rogers,* we held "that materiality is a matter of law for the court to decide." *Id.* at 251.

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Null was a case where the jury had been given materiality as a fact to decide. The jury found the defendant guilty. Hence, the question of law or fact, *i.e.*, of judge or jury, did not require to be decided in *Null*. As explained in *Rogers*, "the *Null* holding does not control . . . decision as to materiality under § 7206(2)." *Id.* at 251.

Farnan has further contended that, even as a matter of law, there could not have been falsity as to any material matter because her 1984 tax return showed no tax was due, even after the deduction of the $41,139 was excluded, demonstrating that she owed no tax for 1984. She further contended that no other advantage would accrue through the false deduction. That is, however, too simple. A zero tax conclusion depends on the correctness of perhaps every item going into the tax return. The entry of a false deduction such as the one here creates grounds for suspicion as to the accuracy of all the income statements or deductions. Expenditure of time and effort by the Internal Revenue Service might well become necessary as a result of the false deduction for the IRS to meet its monitoring responsibilities, though it might be unnecessary for the IRS to verify the accuracy of the return if the false deduction had not been claimed.*

Farnan's claim that proof was lacking that she knew the false statement's materiality or falsity approaches the same argument in a different guise. Farnan has insisted that her belief, even if not reasonable, led inexorably to acquittal. The district judge's charge that a good faith misunderstanding may negate willfulness

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* The fact that verification having been undertaken revealed that no tax was actually due did not affect the time, effort and expense of the making of the investigation.

adequately addressed the matter. Examination of the evidence in the light most favorable to the government has indicated sufficient proof of willfulness. *Glasser v. United States,* 315 U.S. 60, 80 (1942).

Farnan also sought to defend on the grounds that her accountant had made the mistake of entering the deduction in 1984. There were, however, sufficient grounds for questioning the completeness and accuracy of the information provided by Farnan to the accountant. The district judge's instruction on good faith as a consequence of an accountant's advice was adequate, and, of course, Farnan was not entitled to insist on her own language rather than that of the district court.

One complaint by Farnan concerned statements by the prosecutor she claimed to have been derogatory and prejudicial. The district judge, however, sustained objections to many of the questions of which Farnan has complained, questioned their relevance, and took the prosecutor to task for pursuing the case in that manner. Impropriety, we can assume, was shown, but resulting prejudice was not. *United States v. Brockington,* 849 F.2d 872, 875 (4th Cir. 1988). Farnan's complaints related to a count or counts for which Farnan was acquitted, and the district judge's conduct with respect to the prejudicial and derogatory remarks adequately insulated them from consideration of the materiality claim.

Other arguments have been advanced by Farnan, but the requirement that instructions "must be viewed in the context of the overall charge," *United States v. Park,* 421 U.S. 658, 675 (1975); *Cupp v. Naughten,* 414 U.S. 141, 146 (1973), together with the necessity for plain error to raise objections not asserted at trial, and the district court's discretion over whether to make

a transcript available to the jury, *United States v. Meredith,* 824 F.2d 1418, 1425 (4th Cir.), *cert. denied,* 484 U.S. 968 (1987), provide adequate responses. The *Allen* charge, derived from *Allen v. United States,* 164 U.S. 492 (1896), given to a jury, which was hung after approximately three hours of deliberation, did not depart from a regularly employed procedure and its use here by no means amounted to an abuse of discretion, Farnan's dissatisfaction with the method of the "struck jury" selection has been met with the rationale of *United States v. Blouin,* 666 F.2d 796 (2d Cir. 1981) ("jury box"), which we find more pertinent than the case Farnan has cited, *United States v. Ricks,* 802 F.2d 731 (4th Cir.), *cert. denied,* 479 U.S. 1009 (1986). The attempt to gain a new trial because of newly discovered evidence must fail. It sought to bolster and supplement the testimony at trial of Farnan's accountant with material from an affidavit of the accountant who had testified at the trial. It was not newly discovered evidence. *United States v. Chavis,* 880 F.2d 788, 793 (4th Cir. 1989); *United States v. Bales,* 813 F.2d 1289, 1295 (4th Cir. 1987).

Accordingly, the judgment is

AFFIRMED.

Appendix A

WIDENER, Circuit Judge, dissenting:

The majority affirms Mrs. Farnan's conviction holding that the deduction on her 1984 tax return was a material matter under 26 US.C. § 7206(1). I respectfully dissent.

In *United States v. Null,* we held that "[u]nder § 7206(1) the test of materiality is whether a particular item must be reported 'in order that the taxpayer estimate and compute his tax correctly.' " 415 F.2d 1178, 1181 (4th Cir. 1969) (citations omitted). *Null* remains the law in this circuit. Ordinary deductions need not be reported on personal tax returns. Thus, it is not the case that Farnan's deduction "must be reported." Because of Farnan's tax situation, neither could that particular deduction have had any effect on the estimation or computation of her tax. Therefore, under *Null,* the deduction was not material as a matter of law.

The majority opinion disregards the definition of materiality in *Null* and calls the deduction "material" based on the time and effort expended by the Internal Revenue Service in verifying the correctness of the deduction. Without *en banc* consideration, the test of materiality in this circuit remains as defined in *Null.* Because Farnan's deduction fails this test, I would reverse her conviction.

APPENDIX B — AFFIDAVIT OF DAVID S. BILL, JR. DATED JUNE 28, 1990

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

CRIMINAL NO. 90-60-A

UNITED STATES OF AMERICA

v.

JEANNE A. FARNAN

AFFIDAVIT OF DAVID S. BILL, JR.

1. My name is David S. Bill, Jr. I prepared the tax returns for which the defendant in this case was indicted and I was called to testify at the trial as a witness for the government.

2. I have learned that the jury returned a verdict of guilty against the defendant on the charge that the 1984 return was false as to the inclusion of a deduction for $41,139 of interest due to Piedmont Savings & Loan Association.

3. I am personally very disturbed over a guilty verdict for Mrs. Farnan over that item, and I am convinced that a miscarriage of justice has somehow occurred and an innocent person may be convicted and sentenced falsely. I know that I personally calculated that $41,139 figure and decided to include that figure on the 1984 return, with no urging or pressure by Mrs. Farnan.

4. As soon as I heard of the verdict I called the attorney

for Mrs. Farnan to ask how I could bring to the court's attention the facts that I know, and which I told to the prosecuting attorneys before the trial, but which obviously did not get through to the jury. As a result of that I am submitting this affidavit.

5. These basic facts are:

(a) Mrs. Farnan gave me the information that she had a loan with Piedmont Savings encumbering her home, which originated in 1980 and lasted into 1985, the last year for which I completed a personal return for her.

(b) Mrs. Farnan brought to me a few important documents concerning this loan:

(i) three pages of a printed transcript by Piedmont of charges and payments on the loan for periods 1982 and 1983. Copies of these are attached hereto as Exhibits A1, A2 and A3.

(ii) a Form 1098 issued to Mrs. Farnan by Piedmont in 1985, showing the total amount of interest paid on that loan in 1985 to have been $100,787.73, although not by Mrs. Farnan. A copy of the Form 1098 is attached hereto as Exhibit B.

(iii) information as to ownership and description of the real estate sufficient for one to check the land records of Prince William County to verify ownership and deed of trust information which was on record.

(c) From the information Mrs. Farnan gave me I was able to, and did, check the land records of Prince William

Appendix B

County and verify Mrs. Farnan's ownership, the existence of the Piedmont trust, its original amount and interest rate. Also from the information she gave me I was able to determine that the last regular payment on the Piedmont account was in August, 1983, and what the unpaid principal balance was at that time.

There was a substantial second trust holder behind Piedmont, Ralph D. Kaiser, and no evidence of foreclosure activity by Piedmont at any time in 1983, 1984 or 1985. In fact, foreclosure was by Ralph D. Kaiser and not Piedmont. Mrs. Farnan's recollection was weak on what had happened. I felt that borrowed funds from Kaiser or from some other source kept Piedmont current in 1984 and I proceeded to calculate the Piedmont interest that would have been paid to Piedmont in 1984.

(d) I do not use, on a tax return, any figure that a client gives me as to interest amount on an amortized mortgage, without personally verifying it. Without either a year-end mortgage statement, a 1098 or amortization schedule or report from the lender, which includes late charges, payments in excess of escrows for taxes and like items, it is, for practical purposes, *impossible* for any ordinary person to know what part of his or her payments on a mortgage are properly called interest. I *always* do my own verification or calculation of interest before I put it on a tax return and did that for Mrs. Farnan for 1984.

For 1984 I did not have or get from Piedmont any statement, and I did not think I needed one. I did a calculation on my computer of an amortization schedule, based on the information I had. That printout is still in

my file, which I showed the government, and it is attached hereto as Exhibit C. Actually, that schedule was a little off, because Piedmont seems to add items to principal a little oddly, and my numbers did not match theirs exactly, but they were close. I did a little more work to adjust my numbers, as shown by my handwritten notes on this printout.

(e) After examining my work papers carefully I have discovered an item which I did not notice before the trial. I determined that the Piedmont principal balance to be used at the start of the year 1984 should be $249,527, not the $249,092.65 which had been generated in my initial computer run. I wrote the figure of $249,527 in ink at the bottom of that computer printout and you can see it there at the end of Exhibit C. I then recalculated a payment schedule for 1984, using that starting balance and produced the total interest figure for the year as $41,139.19.

A chart of that calculation is as follows:

	Balance Forward		$249,527.00	
		Rate	16.50%	
Month	Payment	Principal	Interest	Balance
				$249,527.00
1	$3,465.48	$34.48	$3,431.00	249,527.52
2	3,465.48	34.96	3,430.52	249,457.56
3	3,465.48	35.44	3,430.04	249,422.12
4	3,465.48	35.93	3,429.55	249,386.20
5	3,465.48	36.42	3,429.06	249,349.78

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6	3,465.48	36.92	3,428.56	249,312.86
7	3,465.48	37.43	3,428.05	249,275.43
8	3,465.48	37.94	3,427.54	249,237.49
9	3,465.48	38.46	3,427.02	249,199.02
10	3,465.48	38.99	3,426.49	249,160.03
11	3,465.48	39.53	3,425.95	249,120.50
12	3,465.48	40.07	3,425.41	249,080.43

TOTAL INTEREST: $41,139.19.

I am going into this amount of detail only to show that the interest figure that was put on the return came from me, not from Mrs. Farnan. Mrs. Farnan got that figure for her list, even down to the last 19¢, from me, not the reverse.

(f) I have asked to look at the transcript of my testimony at the trial and I find on pages 23 and 24 of the transcript I answered the government attorney's questions with the *basic* fact that I am saying here: that I produced the interest figure, and decided to report it in 1984, not Mrs. Farnan, but somehow an opposite impression seems to have been conveyed. That series of questions and answers is:

Q. With regard to the Schedule A, the itemized deductions section, looking at the interest paid on various items, specifically line 11, how much, if any, money is identified as having been paid to home mortgage institutions?

A. Piedmont, $4,000, $41,139, sir.

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Q. What was your understanding from Mrs. Farnan about whether that money had actually been paid?

A. I don't know that I ever questioned her on that.

Q. Where did you get the information?

A. I got it from the, from an amortization table and what information I had from Piedmont. Piedmont's records I had were not complete.

Q. Where did you get the Piedmont records from?

A. From Mrs. Farnan.

Q. The Piedmont records didn't have a statement for how much interest was paid in 1984, did it?

A. No. I made out the amortization sheet down at my real estate office.

(g) Prior to the trial I was called in to the offices of the prosecuting attorneys to go over what I knew, as a witness for the government, and I told them what I am saying here, excepting only the facts in subparagraph (e) above, which is added to corroborate the basic point I am making. I do not understand how the government could proceed to prosecute a charge based upon the Piedmont interest when I personally made all the calculations and

decisions about reporting it on the return.

(h) After I realized that the operating losses Mrs. Farnan sustained during these tax years effectively eliminated the possibility of a tax for any of them, with or without the above interest deduction, I did not work as hard on individual items as would have been the case if the result would affect the imposition of a tax. I felt it was immaterial and conveyed that impression to Mrs. Farnan.

For example, I could have eliminated the entire Piedmont interest figure from the 1984 tax return and Mrs. Farnan's net personal loss for the year would have changed from ($56,350) to ($15,211), still with no tax due. See a copy of 1984 return attached as Exhibit D. And any operating loss carryover was forfeited by bankruptcy in 1985.

6. I believe I explained sufficiently at the trial that when I began working on the 1985 return and calculating the total amount of Piedmont indebtedness that I intended to write off on that return, the materials Mrs. Farnan had given me originally, especially the Form 1098, indicated that the 1984 interest had actually been paid to Piedmont in 1985, not 1984. But I did not notice it at the time, probably because I felt it was all so immaterial.

7. I still do not feel that there ws any *material* error on that 1984 return and I am certain that Mrs. Farnan had no effective role in reporting that Piedmont deduction for 1984.

Executed this 28th day of June, 1990.

s/ David S. Bill, Jr.
David S. Bill, Jr.

Appendix B

State of Virginia)
)
County of Fairfax)

Subscribed and sworn to before me in my jurisdiction aforesaid this 28th day of June 1990.

s/ Martha R. Gorham
Notary Public

(SEAL)

My Commission expires:
July 15, 1990